

Banking Webinar

April 25, 2018

Daniel A. Beckman
dbeckman@gislason.com

Michael S. Dove
mdove@gislason.com

Dean M. Zimmerli
dzimmerli@gislason.com

April 2018 Banking Webinar

Section I

By: Daniel A. Beckman
dbeckman@gislason.com



Landlord Consents

A landlord consent is a document dealing with the relationship between a lender and a landlord when a loan is secured by personal property located at a place of business rented by the borrower.

Two primary concerns for the lender

- Priority of potential competing liens
- Fixture law



Priority of security interest versus landlord lien unclear under Minnesota law

Landlords liens arise:

- Lien language in lease
- Statutory lien under MN Stat Section 504B.271 (storage of property left behind by tenant).
 - Landlord may sell or otherwise dispose of property twenty-eight days after tenant has abandoned the premises.
 - Landlord may apply a reasonable amount of the proceeds to the removal, care and storage costs and expenses including offset of security deposit.

Fixture law in Minnesota is unclear and factually based upon each particular circumstance.

Factors the court will consider:

- ❑ Whether the property was attached to the realty with a sufficient degree of permanence that the attachment alone changes the character of the property from personalty to realty
- ❑ Intent of the parties
- ❑ Nature of the thing
- ❑ The adaptability to the use of the land and the end sought by annexation
- ❑ The manner of annexation

Landlords do not typically want personal property left behind as is it often more expensive for them to remove and dispose of.

- Landlords will typically agree to subordinate any interest in the personal property or waive any claim to the personal property
- Landlord concerns:
 1. Indemnification for actions of lender in removing property
 2. Condition of property upon property removal
 - Cleanup
 - Damage caused by removal

Timing

- Lender wants sufficient time to remove equipment/evaluate disposal options
- Landlord wants compensation for time lender controls space
 - Monthly versus daily rental

Notice of Default

- ❑ Right to cure
- ❑ Timing of occupancy
- ❑ Include definition of secured property
- ❑ No assumption of lease obligations versus occupancy of property and obligation to pay rent

Questions???

April 2018 Banking Webinar

Section II

By: Dean M. Zimmerli
dzimmerli@gislason.com



Steps to Take in Lending to a Trust

Lending to a Trust – Trust Basics

- A trust is a relationship among the **grantor**, who makes a grant of property to be held by the **trustee** in trust (as a fiduciary) for the benefit of **beneficiaries**
- Two Broad Categories of Trusts
 - Revocable Trusts
 - Irrevocable Trusts
- Focus should be on:
 - Who is borrowing the money?
 - Who owns the security for the loan?

General Rules for Signing Loan Docs.

- Trust Signature **must include name of Trustee, not just name of Trust**
 - WRONG: The Huey, Dewey and Louie Trust
 - RIGHT: Scrooge McDuck, as Trustee of the Huey, Dewey and Louie Trust under agreement dated 2/1/2014

- Review trust documents to ensure correct persons are identified
 - Often the settlors, trustees, and beneficiaries get confused about their legal status

Trust Documents to Review

- Trust Instrument – document that creates and governs
 - For Testamentary Trusts, these are a part of the deceased's Will
 - One document may create many trusts
 - Example: Ward Cleaver Revocable Trust creates a Marital Trust and Family Trust after Ward's death but during wife June's lifetime; at her death, splits into separate Trusts for each of Ward's children
- Certificate of Trust – recorded document summarizing trust terms
 - Works like a summary of the Trust instrument, so whole document doesn't need to be recorded
 - Shows Trust's existence, relevant Trustee powers, identity of Trustees
 - If one is on record and nothing has changed since it was recorded, do not need to have Trustee execute a new one
- Affidavit of Trustee – recorded document affirming trustee's authority
 - Affirms identity of Trustee, that act is within Trustee's power, etc.
 - Execute a new one **every time** there is a recorded document signed by the Trustee

Special Issues When the Borrower is a Revocable Trust

- Grantor of Trust retains the power to **revoke** (terminate/undo) the Trust in its entirety, and remove specific items from the Trust
 - Trustee (who is usually also Grantor, at least at first) usually can distribute Trust property to Grantor for any (or no) reason
- This means it is very easy for property to move back and forth between an individual Grantor and that Grantor's Revocable Trust

Who Is My Borrower With a Revocable Trust?

Document	Who Should Sign/Be Bound
Credit Agreement	BOTH Trustee of Revocable Trust AND Individual Grantor
Security Agreement/UCC	BOTH Trustee of Revocable Trust AND Individual Grantor
Mortgage	Whoever is the title holder of record, <u>exactly</u> as stated in the vesting instrument

- Because it is so easy for Grantor to move property in and out of Trust, or for Grantor to accidentally omit property from Trust, **assume he will do so without notice to Lender.**

Who Is My Borrower With an Irrevocable Trust?

Document	Who Should Sign/Be Bound
Credit Agreement	Trustee of Trust
Security Agreement/UCC	Trustee of Trust
Mortgage	Whoever is the title holder of record, <u>exactly</u> as stated in the vesting instrument

- Irrevocable Trusts = Grantor usually has no or limited powers; Trustee is the driver/decision-maker
- Note that just because the word “Revocable” is in the Trust’s name, doesn’t necessarily mean it’s still revocable
 - Trust instrument will state when the Trust can be revoked
 - Usually, remains revocable until Grantor’s death

Special Issues When Collateral is in an Irrevocable Trust

- Most Trusts give Trustees broad discretion in management of Trust assets, including the power to pledge assets as security, BUT—
 - The power to borrow money or mortgage property is not automatic, so still need to check the trust instrument
 - All Trustee powers are limited by Trustee's fiduciary duty to beneficiaries
- If a Trustee takes an action outside the powers granted in the trust (“ultra vires”), or in the Trustee’s best interest rather than the beneficiary’s (breach of fiduciary duty) **beneficiaries can, in some circumstances, have those acts undone**

Beneficiary Consent & Virtual Representation

- ❑ When in doubt (or when the stakes are high), avoid potential problems by getting beneficiaries' **written acknowledgment and consent** to guaranties/pledges of collateral by Trustee
- ❑ Not all beneficiaries may be competent or available to sign (minors, unborn potential beneficiaries, etc.)
- ❑ Minnesota Trust Code has clear rules regarding **virtual representation** of beneficiaries—delineating who can sign on certain beneficiary's behalf

Questions???

April 2018 Banking Webinar

Section III

By: Michael S. Dove
mdove@gislason.com



Statutory Agricultural Liens

Input Liens

- Minnesota provides various statutory liens to provide protections to those who contribute goods or services for the benefit of a farming operation
 - Crop Production Input Liens
 - Harvester's Lien
 - Landlord's Lien
 - Livestock Production Input Lien
 - Feeder's Lien
 - Veterinarian's Lien

Crop Production Input Lien

- Minn. Stat. § 514.964 Crop Production Input Lien
 - “A supplier furnishing crop production inputs in the ordinary course of business has an agricultural lien for the unpaid retail cost of the crop production inputs”
- Minn. Stat. § 514.963 Definitions
 - “Crop production input”
 - “means agricultural chemicals, seeds, petroleum products, the custom application of agricultural chemicals and seeds, and labor used in preparing the land for planting, cultivating, growing, producing, harvesting, drying, and storing crops or crop products”

Crop Production Input Lien

- “Crop production input” includes:
 - “Agricultural Chemicals”
 - “fertilizers or agricultural chemicals that are applied to crops or to land used for raising crops, including fertilizer material, plant amendment, and plant food. The term includes...a pesticide...”
 - Fertilizers -- 2017 crop can be encumbered by fertilizer applied during 2016.
 - “Petroleum Products”
 - “means motor fuels and special fuels used in the production of crops...”

Crop Production Input Lien

- What does crop production input lien attach to?
 - “Existing crops upon the land where a furnished agricultural chemical was applied”
 - OR “if crops are not planted, to the next production crop within 16 months following the last date” of application
 - e.g., fall fertilizer
 - Crops produced from the furnished seed
 - Crops produced....using a furnished petroleum product.

Crop Production Input Lien

- Possible for crop production input lien to gain priority over existing security interest:
 - First, CPI supplier must provide lender with Lien Notification Statement indicating:
 - Name/address of lender to receive statement;
 - Name/address of supplier
 - Description, date, and cost of CPI (can be anticipated costs)
 - Person receiving CPI

Crop Production Input Lien

- Possible for crop production input lien to gain priority over existing security interest:
 - Within ten days of receiving notification statement, lender must either:
 - Respond with letter of commitment for part or all of the amount specified in notification statement; or
 - Respond with a refusal to provide letter of commitment.
 - If lender does not respond within ten days, “a perfected crop production input lien...has priority over any security interest in the same crops or their proceeds”

Crop Production Input Lien

□ Example

- First Bank has perfected security interest in all of Farmers' crops, including crops grown in future.
- In 2017, Co-op agrees to sell seed corn to farmer on credit.
- Co-op sends lien notification statement to First Bank, indicating \$20,000 of seed corn sold to Farmer.

Crop Production Input Lien

□ Example:

■ Three outcomes:

- If First Bank responds by agreeing to finance the \$20,000, then Co-op does not obtain CPI lien as to that amount
- If First Bank responds by refusing to finance the \$20,000, then Co-op retains lien rights, but will not be prior to First Bank
- If First Bank does not respond within 10 days, then Co-op's CPI lien will have priority over First Bank's (assuming Co-op perfects its lien)

Landlord's Lien

- Minn. Stat. § 514.964 Landlord's Lien
 - “A person leasing real property for agricultural production has a lien for unpaid rent on the crops produced on the real property in the crop year that is the subject of the lease. A landlord's lien becomes effective when the crops become growing crops.”
 - “A landlord's lien...is perfected if a financing statement is filed ...within the time periods set forth in paragraphs (b) to (d).”
 - “A landlord's lien must be perfected on or before 30 days after the crops become growing crops.”

Landlord's Lien

- Priority – Landlord lien is trump card – Minn. Stat. § 514.964
 - “A perfected landlord’s lien under this section has priority over all competing security interests and all agricultural liens in crops and the products or proceeds thereof.”
- But, limited to crops grown on the land rented, and only up to the amount of unpaid rent.
 - Can create problems if landlord files effective financing statement – grain buyers don’t know where crops came from

Harvester's Lien

- Minn. Stat. § 514.964 Harvester's Lien
 - “A person providing combining, picking, harvesting, hauling, baling, drying, or storing services in the ordinary course of business has a lien upon the crops combined...or stored, as the case may be, for the reasonable amount and kind of service provided.”
- Cannot assert a CPI lien for the same goods or services as Harvester's Lien

Harvester's Lien

□ Perfection

- Perfected by filing a financing statement within 15 days after last harvesting services provided

□ Priority

- Perfected harvester's lien has priority over all competing security interests and agricultural liens except:
 - Perfected landlord's lien
 - Perfected CPI lien

Livestock Production Input Lien

- Minn. Stat. § 514.966 Livestock Production Input Lien
 - “A supplier furnishing livestock production inputs in the ordinary course of business has a livestock production input lien for the unpaid retail cost of the livestock production input.”
- Minn. Stat. § 514.965 Definitions
 - “Livestock production input”
 - “means feed and labor used in raising livestock.”

Livestock Production Input Lien

- What does livestock production input lien attach to?
 - “the livestock serviced by the agricultural lienholder”

Livestock Production Input Lien

- Possible for LPI Lien to gain priority over existing security interest:
 - First, LPI supplier must provide lender with Lien Notification Statement indicating:
 - Name/address of lender to receive statement;
 - Name/address of supplier;
 - Description, date, and cost of LPI (can be anticipated costs);
 - Person receiving LPI;
 - Name of person who owns livestock, location of livestock, and description of livestock.

Crop Production Input Lien

- Possible for LPI lien to gain priority over existing security interest:
 - Within ten days of receiving notification statement, lender must either:
 - Respond with letter of commitment for part or all of the amount specified in notification statement; or
 - Respond with a refusal to provide letter of commitment.
 - If lender does not respond within ten days, “a perfected crop production input lien...has priority over any security interest in the same crops or their proceeds”

Feeder's Lien

- “A person has a feeder’s lien on livestock if the person
 - (1) stores, cares for, or contributes to the keeping, feeding, pasturing, or other care of livestock, including medical or surgical treatment and shoeing, and
 - (2) does so in the ordinary course of business, at the request of the owner or legal possessor of the livestock”
- Perfected by filing Financing Statement within 60 days of last providing feeding services

Veterinarian's Lien

- Licensed vet performing emergency services on animal has lien for value of services.

Priority of various livestock liens

- ❑ Perfected Veterinarian's lien has priority over all competing security interests and all agricultural liens
- ❑ Perfected feeder's lien has priority over all SI and Ag liens except for perfected veterinarian's lien
- ❑ Perfected breeder's lien has priority over all SI and Ag liens except for veterinarian's and feeder's lien
- ❑ Perfected LPI is junior to SI (unless lender fails to respond to lien statement), veterinarian's, feeder's and breeder's lien.

Questions???

THANK YOU!

This program is not intended to be responsive to any individual situation or concerns as the contents of this presentation are intended for general informational purposes only. Participants are urged not to act upon the information contained in this presentation without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney or to the presenter of this session.